FORREST C. HUME, B.A., LL.B. *
Barrister & Solicitor of the Bars of
British Columbia, Quebec, New Brunswick and Nova Scotia

1281 West Georgia Street, Suite 201
Vancouver, British.Columbia, Canada V6E 3J7

Tel: (604) 488-1499
Fax: (604) 488-1489
E-mail: fchume@ibm.net

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May 15, 2000.

Office of the Secretary
Case Control Unit
Attn: STB Ex Parte No. 582 (Sub-No. 1)
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Major Rail Consolidation Procedures,
Ex Parte No. 582 (Sub-No. 1)

Dear Sir or Madam:

Attached herewith for filing please find 25 copies of the comments of Canadian Resource Shippers Corporation in connection with the Board's Advance Notice of Proposed Rulemaking in the above proceeding issued April 6, 2000.

Also enclosed is an electronic copy of this letter and the said comments on 3.5-inch IBM compatible floppy diskette, in WordPerfect 7.0 format

Very truly yours,

FCHume

Forrest C. Hume

Attorney for Canadian
Resource Shippers Corporation

FCH/bhn
Encls.

* *denotes law corporation*

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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

Ex Parte No. 582 (Sub-No.1)

MAJOR RAIL CONSOLIDATION PROCEDURES

STATEMENT OF
TERRY A. PARK

Vice-President
Canadian Resource Shippers Corporation

Introduction

The Canadian Resource Shippers Corporation ("CRSC") is a Canadian federal company which has been incorporated for the purpose of facilitating rail-to-rail competition, and assisting resource industries in their transportation endeavours. Reduced costs, increased profitability and enhanced competition for shippers are our primary goals. We focus on those industries who are captive to the rail mode, and which are highly dependent on rail for transporting their goods to market, particularly export destinations.

The CRSC appreciates the opportunity to comment on modifications to the Board's regulations governing proposals for major rail consolidations. Our comments will be confined to one of the four broad concerns which persuaded the Board that it should begin a proceeding to revise its rules governing major rail mergers, namely the need to ensure that competition would not be curtailed by future mergers. The Board has cited

and considered the concerns of a significant number of shippers and smaller railroads that future rail mergers could result in a transcontinental rail duopoly.

For reasons which are set out below, the CRSC believes that the regulations governing proposals for major rail consolidations involving a Canadian railroad should require that merger applicants provide evidence to demonstrate that the proposed merger will not lessen competition in respect of traffic originating in Canada and destined to the United States, for traffic originating in the United States and destined to Canada, or for domestic U.S. traffic bridged through Canada. We also believe that the regulations should specify that the Board's competitive analysis of such mergers include formal consultation with the Canadian Minister of Transport and the Canadian Commissioner of Competition.

Canadian rail duopoly and remedial legislation

Canadian shippers are well aware of the difficulties caused by a transcontinental rail duopoly. Canadian National Railway Company ("CN) and Canadian Pacific Railway Company ("CP) have been operating as a duopoly in Canada for the past 80 years. In order to counterbalance the railroads' substantial market power, the Canadian government has found it necessary to legislate specific competitive access and dispute resolution mechanisms to attempt to level the playing field for captive shippers. These mechanisms apply (in Canada) to international traffic handled between Canada and the United States.

The competitive access mechanisms which were introduced in Canadian legislation in 1988 were **extended interswitching**[1] and **competitive line rates ("CLRs")**[2]. The dispute resolution mechanisms which were introduced in 1988 were **mediation** and **final offer arbitration ("FOA")**[3] Extended interswitching has been effective in Canada for captive shippers which are located within 30 kilometres of a rail interchange point. The effectiveness of CLRs, however, has lessened over the years[4], and the mediation provision has been rendered completely ineffective[5].

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[1]Under the *Canadian Transportation Act*, S.C. 1996 c. 10, local railroad carriers are required to offer prescribed rates to move railcars to connecting rail carriers at an interchange within 30 kilometres of the point of origin or destination of traffic.

[2]Under the *Canadian Transportation Act*, a shipper who is more than 30 kilometres from a rail interchange may apply to the Canadian Transportation Agency to impose a freight rate on the local carrier for the movement of the shipper's cargo from the point of loading to an interchange with a connecting rail carrier. To apply for a CLR, the shipper must first obtain a rate from the connecting carrier for transport from the interchange to the final destination.

[3]Under the *Canadian Transportation Act*, a shipper may invoke FOA, which is an alternate dispute resolution technique in which confidential offers of terms to settle the dispute are submitted to an arbitrator, who is required to choose one of the offers and not allowed to develop any alternative compromise solution. The rationale for this technique is that the parties to the dispute have an incentive to make reasonable offers to avoid the risk of the arbitrator selecting the adverse party's less reasonable offer.

[4] The *National Transportation Act Review Commission* (a statutory body appointed to carry out and report to the Canadian Minister of Transport on a comprehensive review of the operation of the *National Transportation Act, 1987* (the predecessor statute to the *Canadian Transportation Act*) found that "CN and CP Rail have effectively declined to compete with each other through CLRs, and as a result the provision is largely inoperative in Canada" (National Transportation Act Review Commission final report, Volume 1, page 131)

[5] The Canadian railroads declined to use the mediation provisions of the legislation.

Effect of future mergers on rail competition for traffic from Canada to U.S. markets - deterioration of competitive access (CLR) remedy

Notwithstanding the weakening of CLRs for Canadian domestic traffic, Canadian shippers have succeeded in using the CLR provisions of Canadian law for traffic destined to the U.S., by seeking and obtaining connecting rates from a U.S. railroad. I have a direct knowledge of how the CLR provisions of the *Canada Transportation Act* can be thus effective in achieving lower rates for traffic destined to U.S. markets.

Prior to joining the Canadian Resource Shippers Corporation, I was employed by Alberta Gas Chemicals Inc. ("AGC"). In 1989, AGC filed an application with the Canadian regulator to have a CLR established for the movement of methanol from Medicine Hat, Alberta to Coutts, Alberta. AGC's facility at Medicine Hat, Alberta is captive to Canadian Pacific Limited ("CP"). CP's line is connected to BNSF at the Coutts, Alberta - Sweetgrass, Montana interchange. AGC was able to negotiate a connecting rate with Burlington Northern Railroad Co. ("BN") for carriage of the methanol from the CP/BN interchange to destination, which allowed AGC to obtain a CLR for the movement from Medicine hat to the CP/BN interchange. In this way, AGC was able to take advantage of the pro-competitive access provision of Canadian law to obtain lower freight rates for the movement of methanol from Canada to U.S. markets.

As an example of how future mergers involving Canadian railroads can affect competitive access for rail traffic from Canada to U.S. markets, CRSC refers to

the proposed combination of CN and BNSF. That combination will result in the loss of competitive points for interchange of traffic at the existing gateways where CN and BNSF currently connect. At such points following a combination of CN and BNSF, shippers will be unable to get competitive connecting rates in order to access the CLR provisions of the legislation. The use of CLRs to achieve competitive rates for traffic from Canada to U.S. markets will be effectively eliminated at those gateway points.

Effect of future mergers on the final offer arbitration remedy to resolve disputes on traffic from Canada to U.S. markets

Shippers in Canada have the right to invoke the FOA provisions of Canadian law to resolve disputes with CN and CP. FOA is an effective tool to assist captive shippers by levelling the playing field in rate and service disputes.

However, the Canadian Transportation Agency's jurisdiction to refer a matter for FOA is limited to rate and service issues within Canada. It is important that competitive gateways continue to exist between Canadian and U.S. railroads so that shippers that originate international traffic may continue to have the ability to invoke FOA to resolve disputes on rates and service issues to those points of connection. Future mergers, such as the combination proposed between CN and BNSF, will diminish the number of competitive gateways available to shippers of international traffic from Canada to U.S. markets.

Effect of future mergers on rail competition for traffic from Canada to U.S. markets - deterioration of competition by shippers' choice of routes and carriers

Shippers in Canada currently have the right to specify, in a Bill of Lading, that their traffic is to be carried by the originating carrier to an interchange point, thence via another carrier beyond to destination. This is usually done by reference to AAR Accounting Rule 11 for the movement beyond the interchange point (although the existence of Rule 11 is not essential for that purpose). The Bill of Lading reference signals the originating carrier that the shipper has chosen a routing for its traffic which requires the originating carrier to interchange the traffic to a connecting carrier for furtherance to destination.

This fundamental right of Canadian shippers to choose their own routings for the movement of their goods, to choose which carrier or combination of carriers will carry those goods, and to obtain the best price for the movements in making those decisions, has been upheld in Canadian jurisprudence, and is based on the interpretation of Canadian National Transportation Policy as expressed in section 5 of the *Canada Transportation Act*[6].

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[6]See Canadian Transportation Agency decision No. 457-R-1997 dated July 17, 1997; also the decision of the Canadian Federal Court of Appeal in *Canadian National Railway Company* v. *Eagle Forest Products Limited Partnership* dated December 13, 1999, Docket A-731-97 (as yet unreported) which dismissed CN's appeal of Canadian Transportation Agency decision No. 457-R-1997.

Future mergers involving Canadian railroads will affect these rights. For instance, a CN/BNSF combination would effectively eliminate the ability of shippers to seek competitive rates in this manner at points where CN connects with BNSF. The effect would be a loss of existing rail competition at those points for traffic destined to U.S. markets.

Effect of future mergers on rail competition for traffic from Canada to U.S. markets - consequence to laws of foreign jurisdiction

In the past, the Interstate Commerce Commission ("ICC") has taken into account the differences in U.S. and Canadian laws in making decisions involving the Canadian railroads.

For instance, in 1981, following the enactment of the *Staggers Rail Act of 1980*, the ICC agreed to treat the Canadian railroads as one integrated enterprise in respect of rates processed through rate bureax. Again in 1984, when new rules on rate-making were introduced in the U.S. that required rates to be set on a direct connector, route by route basis, the ICC ruled that the Canadian railroads would continue to enjoy immunity from the application of the U.S. anti-trust laws in dealing jointly with U.S. carriers. The raison d'être for these decisions was that the Canadian law at the time authorized collective rate-making by the Canadian railroads, notably CN and CP.

These decisions were consistent with the principle of comity of nations, whereby the courts of one jurisdiction will strive to give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect.

Summary

Future mergers between Canadian and U.S. railroads will have substantive consequences to Canadian National Transportation Policy; specific legislative rights and remedies, and the ability of shippers to seek and obtain competitive rates for traffic destined to U.S. markets. It is for these reasons that the CRSC requests that the regulations governing proposals for major rail consolidations involving a Canadian railroad should require that merger applicants provide evidence to demonstrate that the proposed merger will not lessen competition in respect of international traffic, and that the regulations should specify that the Board's competitive analysis of such mergers include formal consultation with the Canadian Minister of Transport and the Canadian Commissioner of Competition.

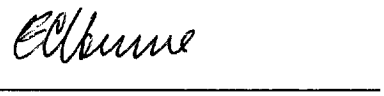
Respectfully submitted on behalf of Mr. Terry A. Park

Forrest C. Hume
201 - 1281 West Georgia Street
Vancouver, B.C., Canada V6E 3J7
(604) 488-1499

Attorney for Canadian Resource Shippers Corporation

CERTIFICATE OF SERVICE

I certify that this 15th day of May, 2000, I have served a copy of the foregoing on all parties of record on the Service List in accordance with the Board's Rules of Practice.



Forrest C. Hume